Filed 10/12/12 P. v. Gutierrez CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. REX DALE ALEXANDER GUTIERREZ, Defendant and Appellant.	D059748 (Super. Ct. No. FSB902123)

APPEAL from a judgment of the Superior Court of San Bernardino County, Duke D. Rouse, Judge. Affirmed.

Rex Dale Alexander Gutierrez appeals a judgment following his jury conviction of one count of conspiracy to commit grand theft by false pretenses and presentation of a fraudulent claim (Pen. Code, §§ 182, subd. (a)(1), 484, 532, 72),[1] two counts of grand theft by false pretenses (§§ 487, subd. (a), 532), and one count of presentation of a fraudulent claim (§ 72). On appeal, Gutierrez contends: (1) after a mistrial the trial court

1 All statutory references are to the Penal Code unless otherwise specified.

violated section 1009 and denied him due process of law by granting the prosecution leave to amend the information to add the conspiracy charge and change the grand theft theory from embezzlement to false pretenses; (2) the trial court denied him due process of law and other constitutional rights by not, directly or indirectly, granting use immunity to a witness; (3) the trial court erred by admitting statements of an alleged coconspirator; and (4) section 654 precluded his punishment for both counts of grand theft by false pretenses.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2006, Bill Postmus, Chairman of the San Bernardino County (County) Board of Supervisors and County Assessor-Elect, recommended to County's director of human resources that 13 new positions be created for the Assessor's office. Postmus told Adam Aleman, his campaign manager, those new positions would enable him to promote his political agenda and maintain political power at County's expense. Those new positions were created, including the position of intergovernmental relations officer with a salary range of $59,883 to $76,502. The job description for that position was "[r]esponsible for performing sensitive tasks associated with developing and maintaining the effective working relationships between County Assessor and other local jurisdictions." All 13 positions were for "exempt" employees and typically were management and executive positions.

After Postmus became County Assessor, he filled those 13 positions with persons who became known as his "executive staff," a code phrase for his political staff. They were to perform Postmus's political work (e.g., fundraising). In January 2007, Robert

Hunter, formerly a Postmus field representative, was hired for the intergovernmental relations officer position. When he was hired, there was no discussion of his job duties or any orientation.

On February 2, 2007, Gutierrez, a school teacher and Rancho Cucamonga City Councilmember, was informed by his principal that he would not be recommended to return to work as a special education teacher the following school year. On February 6, Gutierrez met with his principal and the human resources director and completed a form stating he would resign in June. Gutierrez then told land developer Jeffrey Burum that he needed a job. Burum told him Postmus owed him a favor and asked him how much compensation he wanted.

On February 23, Gutierrez met with Postmus and Aleman, now the Assessor's Communications Director, to interview for the position of the Assessor's intergovernmental relations officer, even though Hunter then occupied that position. Gutierrez was the only person interviewed for the job. The interview was not a typical interview and was more of a political and social conversation. Burum and his projects in Rancho Cucamonga (City) were discussed. At the end of the interview, Postmus told Gutierrez that Aleman would find something for him to do and that he would start at the top salary step. Before the interview, Postmus told Aleman he wanted to hire Gutierrez because doing so was near and dear to Burum's heart and that it would be politically advantageous to do so. After the interview, Postmus called Burum and told him he had just hired Gutierrez at the top step. Postmus told Aleman he hired Gutierrez as a favor to

Burum. Postmus said that if he took care of Gutierrez and Gutierrez took care of Burum, then Burum would take care of him (Postmus).

On February 27, Hunter was informed without explanation that he was terminated from his position as the Assessor's intergovernmental relations officer. On March 9, Gutierrez submitted a second resignation letter to his school, stating he was resigning immediately.

Gutierrez, Postmus, and Aleman understood that the purpose of Gutierrez's position with the Assessor was to keep him available to Burum in City. Gutierrez stated that Burum takes care of him, so he needs to take care of Burum. He bragged to others that he worked for "Daddy Jeff" (i.e., Burum). Gutierrez stated he wanted to make sure Burum was part of a 1,200-acre project in City. Gutierrez told Theodore Lehrer, the Assessor's communications officer, he was close to Burum, who helped him get his job. Gutierrez told Lehrer he wanted to take care of the 1,200-acre project for Burum. He also told Lehrer that Mark Davidson, co-owner of a night club with Burum, told him that if he (Gutierrez) "play[ed] ball," Burum would see that he was taken care of.

Because Gutierrez's position was a sham job and had no actual duties, he was assigned work to create the appearance he was actually doing something. But rather than performing that assigned work, Gutierrez often conducted City business during his County work hours. Between March 2007 and January 2009, he regularly attended City events during his County work hours. Two or three times during the workday, Gutierrez was overheard making telephone calls in which he identified himself as Councilman Gutierrez. Every day he brought to work binders labeled "City of Rancho Cucamonga."

After about six or seven weeks, he began leaving his County office without informing the responsible secretary where he was going. He often left for lunch and did not return to the office. On about 25 to 30 percent of his work days, he did not show up at all. The Assessor's Office operations staff never saw any tangible work product from Gutierrez during his time there. He sometimes explained his absences by stating he met with Burum, even though there was no County work reason for the meeting.

Aleman repeatedly spoke with Postmus regarding Gutierrez's job performance, but Postmus told him he (Postmus) was not authorized to discipline him and that his hands were tied because he could not upset Burum. Postmus agreed to meet with Burum regarding Gutierrez's job performance. Aleman and Lehrer prepared "talking points" for Postmus to discuss Gutierrez with Burum. On April 10, 2008, that document was found on top of Postmus's desk during a search. After Aleman resigned in April 2008, Harlow Cameron, his successor, repeatedly expressed to Postmus his concerns regarding Gutierrez's absences and inaccurate time sheets. Postmus told Cameron he knew about the problem, but never committed to do anything about it and implied there was some other influence affecting his supervision of Gutierrez. Postmus told Lehrer he did not want to discipline Gutierrez because he did not want to upset Burum. However, Postmus was upset with Gutierrez's absences and non-Assessor related work, stating Gutierrez did not "give a fuck about me or my office."

Gutierrez did not regularly complete daily activity reports (DARs) showing whether he was in the office or at an event for the Assessor's Office. Despite his frequent absences from the office, he regularly submitted time sheets showing he worked 40 hours

per week. Aleman and Cameron signed Gutierrez's time sheets because Postmus ordered them to do so and not because they could verify the time sheets were accurate. During his first year of County employment, Gutierrez took five sick days when he was, instead, attending City events. He also claimed to have worked 156 hours for County while he was attending City events.

Aleman had an agreement with Postmus and Gutierrez to allow Gutierrez to be available to Burum during County work hours. Gutierrez acknowledged that agreement by telling Aleman he (Gutierrez) was allowed to meet with Burum as often as necessary to conduct City business. Telephone records showed about 350 telephone calls between Gutierrez and Burum from March 17, 2007, through January 3, 2009. Burum was on the Board of Directors of National Core, which had projects requiring the vote of City's council. Burum was also a member of an alliance competing for the purchase of a 1,200-acre property that required City approval. Gutierrez always supported Burum's projects. In August 2007, City's council passed a $42.5 million project extension agreement with Burum and National Core. Gutierrez enthusiastically supported that project. A note found in Postmus's apartment referred to Burum, Gutierrez, and a 1,100-acre project.

Cameron eventually was allowed to introduce an item to County's Board of Supervisors that would eliminate the intergovernmental relations officer position. As of October 7, 2008, that position was eliminated. However, on that date, Cameron received an e-mail from Postmus informing him Gutierrez would be staying on the Assessor's payroll for an additional week. In an e-mail to Burum dated October 10, Gutierrez asked Burum for assistance, stating: "Jeff, I need you to prevail upon Bill P. to extend my

position for up to three weeks. HR is taking quite a while reviewing everything. I believe I am overqualified for the ECD Specialist I position. I deserve a shot because I'm the best candidate. Can you give Bill a call?" Gutierrez remained employed by the Assessor for months thereafter even though there was no money budgeted for his position. After Postmus left office as the Assessor, Dennis Draeger, his successor, wrote a memorandum on December 12, 2008, to give Gutierrez notice that his employment would end on January 3, 2009. A few days later when Draeger finally located him, Gutierrez refused to sign an acknowledgement that he received the notice.

On February 5, 2010, an information was filed, charging Gutierrez with two counts of grand theft by embezzlement (§ 487, subd. (a)), one count of public officer crime (§ 424), and one count of presentation of a fraudulent claim (§ 72). On June 9, a jury trial began. The trial court granted Gutierrez's motion for acquittal on the public officer crime charge (count 3). On July 1, the court declared a mistrial after the jury declared it was deadlocked.

On August 13, 2010, the trial court granted the prosecution's motion to amend the information. An amended information was filed, charging Gutierrez with conspiracy to commit crimes of grand theft by false pretenses and presentation of a fraudulent claim (count 1, §§ 182, subd. (a)(1), 484, 532, 72), two counts of grand theft by false pretenses (counts 2 and 3, §§ 487, subd. (a), 532), and one count of presentation of a fraudulent claim (count 4, § 72).

At trial, the prosecution presented evidence substantially as discussed above. In his defense, Gutierrez testified he talked to Burum and others to help him find a job after

he learned his teaching contract would not be renewed. Postmus never told him (Gutierrez) that his position was a sham job or a quid pro quo, and he (Gutierrez) considered his job to be legitimate. He was told his job had no specific duties or schedule, but that he was to visit cities, attend events, and shed a positive light on the Assessor. He was not supposed to do anything for Burum in return for his job. He received positive reviews. He took City materials into the office for safekeeping. He believed he had a flexible work schedule. He testified that he performed legitimate work for the Assessor's Office. He testified he had known Burum for 20 years and Burum had supported his campaign, but denied that any of Burum's contributions affected his City council votes. Although he voted for Burum's project, Gutierrez testified it was a unanimous vote because Burum's company was the best. Gutierrez denied performing any City business while working at the Assessor's Office.

The jury found Gutierrez guilty on all counts. The court sentenced him to an aggregate term of two years eight months in prison.[2] Gutierrez timely filed a notice of appeal.

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2 The court imposed a two-year term for count 2, a consecutive eight-month term for count 3, and stayed execution of terms imposed for counts 1 and 4 pursuant to section 654.

DISCUSSION

I

Amended Information

Gutierrez contends that after the mistrial in the first trial, the trial court violated section 1009 and denied him due process of law by granting the prosecution leave to amend the information to add the conspiracy charge and change the grand theft theory from embezzlement to false pretenses. He asserts there was insufficient evidence admitted at his preliminary hearing to support the new conspiracy charge. He also asserts he did not receive adequate notice of the new conspiracy charge and the change in grand theft theory to grand theft by false pretenses.

A

On February 5, 2010, the original information was filed, charging Gutierrez with two counts of grand theft by embezzlement (§ 487, subd. (a)), one count of public officer crime (§ 424), and one count of presentation of a fraudulent claim (§ 72). On June 9, the first jury trial began. On July 1, the court declared a mistrial after the jury declared it was deadlocked.

On August 13, 2010, the trial court granted the prosecution's section 1009 motion for leave to amend the information and an amended information was filed, charging Gutierrez with conspiracy to commit grand theft by false pretenses and presentation of a fraudulent claim (count 1, §§ 182, subd. (a)(1), 484, 532, 72), two counts of grand theft by false pretenses (counts 2 and 3, §§ 487, subd. (a), 532), and one count of presentation of a fraudulent claim (count 4, § 72). The amended information added a new charge of

conspiracy and changed the theory of theft in counts 2 and 3 from grand theft by embezzlement to grand theft by false pretenses. In granting the prosecution's motion, the court stated:

> "[Section] 1009 indicates that the motion has to be decided based on what is in the preliminary hearing transcript. I think, notwithstanding whatever the evidence at the trial was, I have to make a determination on what was in the preliminary hearing transcript. As I indicated, I reviewed the preliminary hearing transcript, and without commenting on how strong or how weak I think that evidence is, I think there's sufficient evidence there to allow the amendment."

On September 27, the second trial began. On October 27, the jury returned its verdicts finding Gutierrez guilty on all counts.

B

Section 1009 authorizes a trial court, at any stage of the criminal proceedings, to permit the prosecution to file an amended information if it does not "charge an offense not shown by the evidence taken at the preliminary examination." Section 1009 provides in pertinent part:

> "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . . The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. . . ."

"In a variety of circumstances, appellate courts have held that when jury disagreement leads to a mistrial, the district attorney may amend the information under section 1009 to add a new charge shown by the evidence at the preliminary hearing without violating the defendant's constitutional or statutory rights. (See *People v. Brown* (1973) 35 Cal.App.3d 317, 322-323 . . . ; *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020-1021 . . . .)" (*People v. Williams* (1997) 56 Cal.App.4th 927, 932.) The trial court's decision to allow amendment of the information pursuant to section 1009 is reviewed on appeal for abuse of discretion. (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581; *People v. Miralrio* (2008) 167 Cal.App.4th 448, 458; *People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

C

We conclude the trial court did not abuse its discretion under section 1009 by granting the prosecution leave to file an amended information adding a new charge of conspiracy. The court reviewed the preliminary hearing transcript to determine whether there was sufficient evidence to support that charge. We, like the trial court, conclude there was sufficient evidence presented at Gutierrez's preliminary hearing to support a conspiracy charge.

"A conspiracy is shown by evidence of an agreement between two or more persons with the specific intent to agree to commit a public offense and with the further specific intent to commit such offense, which agreement is followed by an overt act committed by one or more of the parties for the purpose of furthering the object of the

agreement. [Citation.] The agreement or the unlawful design of conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy." (*People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 20.) "[M]ere association does not prove a criminal conspiracy . . . ." (*Ibid*.)

At the preliminary hearing, there was sufficient evidence, circumstantial or otherwise, presented to support a finding that all of the elements of conspiracy were shown. Hollis Randles, a district attorney investigator, testified at the preliminary hearing that Aleman told him Gutierrez bragged openly to him and others that Burum got him his Assessor's Office job. Gutierrez told Aleman that he (Gutierrez) "answered to Jeff Burum." He said he didn't answer to Postmus. He "answered to Jeff Burum and no one else." Gutierrez told Aleman that before he was hired at the Assessor's Office, he was a school teacher and his teaching schedule made it difficult for him to attend City planning commission meetings. Gutierrez stated that Burum approached him and said, "Bill Postmus owes me. How much do you want to make?" After that, Gutierrez was hired at the Assessor's Office. Gutierrez told Aleman that he (Gutierrez) "made [Burum] a rich man." Gutierrez stated that he had voted as a City councilmember for Burum's projects, Burum "owes him," and he was making Burum a very rich man. Aleman complained to Postmus about Gutierrez's open bragging that Burum got him his job at the Assessor's Office. He also complained to Postmus about Gutierrez not coming to work and submitting time sheets for time not worked, but Postmus told Aleman he (Postmus) could not do anything about Gutierrez and he would have to meet with Burum about

Gutierrez. Aleman wrote a memorandum of "talking points" for Postmus to use when he discussed Gutierrez with Burum. Postmus told Aleman that the only person who could do anything about Gutierrez was Burum.

Morey Weiss, a district attorney investigator, testified at the preliminary hearing that Aleman told him Gutierrez explained his absence from the Assessor's Office on at least 20 occasions that he was with Burum even though there was no County work-related reason for meeting with Burum. During Gutierrez's employment interview, no information was discussed regarding the Assessor's Office. Postmus did not know Gutierrez before the interview. Postmus told Gutierrez that Aleman would find him something to do at the Assessor's Office. Immediately after the interview, Postmus called Burum and told him everything was okay and that he hired Gutierrez, who would be brought in at a step five salary to give him a little additional pay. Aleman said Gutierrez told him Burum wanted him (Gutierrez) hired because it was important to Burum that he (Gutierrez) take care of Burum's projects that were "in the hopper." Aleman said he had concerns about disciplining Gutierrez because he did not want Burum upset with Postmus or him. Aleman told Weiss that on one occasion when a group of Assessor's Office employees were returning from lunch, Gutierrez bragged to the group that he got his job because of Burum, Burum "takes care of him," and he really worked for Burum.

Hollis also testified that he spoke with Lehrer, who said Postmus told him that Burum asked him to hire Gutierrez, which he did "as a favor to Jeff Burum." Although Postmus had received many complaints about Gutierrez's lack of work and telephone calls regarding City business, he did not want to unilaterally fire Gutierrez because he did

not want to upset or anger Burum by doing so. Gutierrez told Lehrer that Burum had got him his job at the Assessor's Office and he (Gutierrez) had supported Burum's projects as a City councilmember. Gutierrez stated he had supported Burum's low income projects in City and he wanted to support Burum's joint venture project involving 1,200 acres.

Gary Barnes, a district attorney investigator, testified at the preliminary hearing that Josh White, an Assessor's Office employee, told him that on one occasion when he was in Aleman's office, he overheard a speakerphone conversation between Aleman and Gutierrez in which Aleman expressed his concern that Gutierrez was not at the office and Gutierrez responded that he "had the position so he could do City business."

The above preliminary hearing evidence is sufficient to support the charge of conspiracy to commit crimes. It supports a reasonable inference that Postmus, Burum, Aleman, and Gutierrez agreed that Gutierrez would be given a County job as a favor to Burum with no expectation that he would perform any actual work on behalf of County, except as necessary to prevent detection of the conspiracy. The fact that Aleman did not "agree" with Gutierrez's explanation that he got his County job so he could work on City business does not disprove that Aleman was in agreement with the other conspirators to provide Gutierrez with a sham job. Rather, it could be reasonably inferred that although Aleman did not personally favor the arrangement, he nevertheless implicitly agreed to it by his conduct. Furthermore, it could be reasonably inferred Aleman was upset that after Gutierrez was hired (in furtherance of the conspiracy), he (Gutierrez) threatened to expose the conspiracy by not working hard, by his excessive absences, and by his bragging to others that Burum got him the job. In any event, even if Aleman were not

one of the conspirators, there nevertheless was sufficient evidence of a conspiracy among Postmus, Burum, and Gutierrez.

There was sufficient evidence to support a finding that Gutierrez was a conspirator and not merely an innocent beneficiary of the conspiracy. As discussed above, the preliminary hearing evidence showed Gutierrez bragged openly to Aleman and others that Burum got him his job. Gutierrez said he answered to Burum and not Postmus. Gutierrez said he made Burum a rich man and that Burum owed him. The preliminary hearing evidence supports a reasonable inference that Gutierrez knew Postmus gave him his County job as a favor to Burum, whose projects Gutierrez had supported and would continue to support as a City councilmember, and that Gutierrez did not expect to perform any actual work for County. As part of their agreement, Postmus would favor Burum by hiring Gutierrez in a sham job, Burum would then continue to favor Postmus politically, and Gutierrez would continue to favor Burum's projects as a City councilmember. The evidence also supports a reasonable inference that Gutierrez entered into this agreement or arrangement with the other conspirators with the specific intent to commit the crimes of grand theft by false pretenses and presentation of a fraudulent claim. Likewise, the evidence supports a finding that one of more of the conspirators committed an overt act in furtherance of their conspiracy. The evidence showing Postmus hired Gutierrez as the intergovernmental relations officer at the highest salary step was one overt act in furtherance of the conspiracy.

Contrary to Gutierrez's assertion, there need not be sufficient evidence to support each of the 26 overt acts alleged in the amended information to have been committed in

furtherance of the conspiracy. He does not cite any case or other authority, and does not persuade us, that section 1009 requires sufficient evidence in support of each of the 26 alleged overt acts when only one overt act is required to be committed in furtherance of a conspiracy.[3] (*People v. Russo* (2001) 25 Cal.4th 1124, 1135.)

We conclude there was sufficient evidence presented at Gutierrez's preliminary hearing to support a finding there was "an agreement between two or more persons with the specific intent to agree to commit a public offense and with the further specific intent to commit such offense, which agreement is followed by an overt act committed by one or more of the parties for the purpose of furthering the object of the agreement." (*People v. Superior Court* (*Quinteros*), *supra*, 13 Cal.App.4th at p. 20.) The trial court did not abuse its discretion under section 1009 by granting the prosecution leave to amend the information to add the new charge of conspiracy. (*People v. Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at p. 1581; *People v. Miralrio*, *supra*, 167 Cal.App.4th at p. 458; *People v. Bolden*, *supra*, 44 Cal.App.4th at p. 716.)

D

We further conclude the trial court did not deny Gutierrez due process of law by granting the prosecution leave to amend the information by adding a new charge of conspiracy and changing the grand theft theory to grand theft by false pretenses. He

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3 Although Gutierrez does not specifically argue there was insufficient evidence to support a finding of the specific intent required for a conspiracy, our review of the preliminary hearing evidence supports a reasonable inference that the conspirators, including Gutierrez, had the required specific intent.

received adequate notice of the new conspiracy charge to defend against it at the second trial. First, as discussed above, there was sufficient evidence of the conspiracy presented at the preliminary hearing, which occurred in January 2010. The amended information was filed on August 13. The second trial began on September 27. Gutierrez had notice of the evidence supporting a conspiracy charge for eight months before the second trial began. He also learned about the prosecution's conspiracy theory during the first trial when the prosecution moved to admit Postmus's statements as a coconspirator pursuant to Evidence Code section 1223 and argued "[p]rima facie evidence will establish the existence of a conspiracy between [Gutierrez], then-Assessor Bill Postmus, and major political contributor Jeff Burum." Furthermore, Gutierrez had notice of the amended information's specific conspiracy allegations for more than six weeks before the second trial began. Gutierrez does not cite any case showing, or otherwise persuade us, the notice was inadequate or otherwise denied him due process of law.

We also conclude Gutierrez received adequate notice of the change in the prosecution's grand theft theory from grand theft by embezzlement to grand theft by false pretenses.[4] "A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the

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4 Gutierrez apparently concedes the trial court did not abuse its discretion under section 1009 by granting leave for the prosecution to file an amended information changing the prosecution's theory of grand theft from grand theft by embezzlement to grand theft by false pretenses. In any event, we conclude the preliminary hearing evidence was sufficient to support the amended information's allegations of grand theft by false pretenses.

intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.) At the preliminary hearing, Schyler Beaty, a district attorney investigator, testified in detail regarding Gutierrez's submission of false time sheets and County's payment of salary to Gutierrez based on his false representations that he had performed work for County as shown on his time sheets. It could be reasonably inferred from that and other preliminary hearing evidence that Gutierrez made those false representations with the specific intent to defraud County of property (i.e., his salary) and County paid him his salary in reliance on those false representations. Therefore, Gutierrez had notice of the evidence supporting the grand theft by false pretenses charges for eight months before the second trial began. The amended information changed only the theory of grand theft from embezzlement to false pretenses. Furthermore, Gutierrez had notice of the amended information's specific allegations of grand theft by false pretenses for more than six weeks before the second trial began. Gutierrez does not cite any case showing, or otherwise persuade us, that the notice was inadequate or otherwise denied him due process of law.

II

Use Immunity

Gutierrez contends the trial court denied him due process of law and other constitutional rights by not, directly or indirectly, granting use immunity to Burum before his second trial.

A

Before Gutierrez's first trial, the trial court denied Burum's motion to quash a witness subpoena served on him by the prosecution. The court explained that based on the evidence presented at Gutierrez's preliminary hearing, Burum probably had relevant testimony regarding the charges against Gutierrez, subject to an Evidence Code section 402 hearing and any Fifth Amendment privilege Burum may assert. Gutierrez argued the real reason the prosecution subpoenaed Burum was to force him to publicly assert his Fifth Amendment privilege. Gutierrez argued the prosecution did not have a good faith basis for believing it could actually elicit Burum's testimony. The court disagreed, stating: "I think there are areas of inquiry [the prosecution] can go into that do not involve Fifth Amendment issues."

Also before the first trial, Gutierrez filed a motion to exclude certain testimony of Burum or, in the alternative, to confer court-ordered immunity on Burum as a defense witness. He apparently sought to exclude testimony regarding a settlement agreement between County and Burum's business entity, Colonies Partners, LP, which arguably would be used only to impeach Burum and not prove his (Gutierrez's) guilt on the charges against him. He also argued that if the prosecution presented evidence from other witnesses showing Burum's role in his hiring or keeping his job, he would be forced to call Burum as a defense witness to rebut that evidence. Furthermore, because Burum was the subject of an ongoing investigation, the trial court "must grant Mr. Burum use immunity, so that Mr. Gutierrez may have his constitutional right to Mr. Burum's testimony."

The prosecution opposed Gutierrez's motion, arguing Burum's testimony regarding how Gutierrez obtained his job was relevant to prove the charges against him. It further argued the trial court did not have authority, in the circumstances in this case, to grant use immunity to Burum.

After the trial court denied Gutierrez's motion (including the request for immunity for Burum), the prosecution called Burum to the witness stand outside the presence of the jury. The prosecutor asked Burum a series of questions regarding his relationships with Gutierrez and Postmus and related matters. Burum invoked his Fifth Amendment privilege and refused to answer each question. His penultimate answer stated: "On the advice of my attorney, it's my intention to not be compelled to be a witness against myself on all questions asked." The trial court found Burum was unavailable as a witness in Gutierrez's case. The first trial ended in a jury deadlock and a mistrial was declared.

After the amended information was filed, a second trial was conducted. Before or during the second trial, Gutierrez did not file a motion to exclude Burum's testimony or to grant him use immunity. However, apparently based on Burum's invocation of his Fifth Amendment privilege during the first trial, the trial court instructed the second jury that Burum was unavailable as a witness. The second jury found Gutierrez guilty on all counts.

B

We conclude Gutierrez forfeited his claim that the trial court erred during the second trial by not granting Burum use immunity because Gutierrez did not request immunity for Burum before or during the second trial. "[A] defendant forfeits a claim

that the court or the prosecutor should have granted immunity to a witness when the defendant has failed to raise that claim in the trial court." (*People v. Williams* (2008) 43 Cal.4th 584, 625.) After a mistrial or grant of a new trial, the parties may relitigate evidentiary rulings the trial court made at the first trial. (*People v. Mattson* (1990) 50 Cal.3d 826, 849-850.) Before and during the second trial, the parties may renew, and the trial court may reconsider, in limine motions objecting to admission of evidence. (*Ibid*.) At the second trial, "objections must be made to the admission of evidence [citation], and the court must consider the admissibility of that evidence at the time it is offered." (*Id*. at p. 850.) "*In limine* rulings are not binding." (*Ibid*.) Because after the first trial and before or during the second trial Gutierrez did not renew his motion seeking to exclude Burum's testimony or, alternatively, to grant use immunity to Burum, he forfeited any claim that the trial court erred by not granting Burum use immunity during the second trial. (*Williams*, at p. 625.)

C

Assuming arguendo Gutierrez did not forfeit his claim that the trial court erred by not granting Burum use immunity during the second trial, we nevertheless are unpersuaded the court violated Gutierrez's constitutional rights by not granting, directly or indirectly, use immunity to Burum.[5] First, Gutierrez has not cited any apposite case showing a defendant in his circumstances is constitutionally entitled to a grant of use

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5 Gutierrez argues the trial court violated his constitutional rights to due process of law, to defend himself, and to compulsory process of witnesses.

immunity for a potential defense witness. Rather, there does not appear to be any established case law showing a trial court must grant use immunity to a potential witness, whether a prosecution or defense witness, if the defendant believes that witness could provide testimony helpful to the defense. "[T]here is no authority in this state for the proposition that a prosecutor must request or the trial court must grant immunity to a witness on the ground that the witness's testimony could be favorable to the defense." (*People v. Cudjo* (1993) 6 Cal.4th 585, 619.) "The grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant. [Citations.] Similarly, we have expressed reservations concerning claims that trial courts possess inherent authority to grant immunity [citation], and even assuming the court possesses such authority, it has been recognized only when the defense has made a showing that a *defense* witness should be afforded immunity in order to provide clearly exculpatory testimony." (*People v. Williams*, *supra*, 43 Cal.4th at pp. 622-623.) None of the federal court cases cited by Gutierrez are apposite or otherwise persuade us a trial court has—and must exercise—its inherent authority to grant use immunity to a potential witness, whether a prosecution or defense witness, if the defendant believes that witness could provide testimony helpful to the defense. (See, e.g., *United States v. Herman* (3d Cir. 1978) 589 F.2d 1191; *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964.)

Second, assuming arguendo a defendant may have a constitutional right in certain cases to judicially conferred use immunity for a witness, we nevertheless conclude that under the two tests discussed in *People v. Hunter* (1989) 49 Cal.3d 957 (*Hunter*),

Gutierrez has not shown he was entitled to use immunity for Burum. The first test recognizes the possibility a trial court may confer immunity on a witness when three elements are shown: (1) the proffered testimony is clearly exculpatory; (2) the testimony is essential; and (3) there is no strong governmental interest that countervails against a grant of immunity. (*Id*. at p. 974, citing *Government of Virgin Islands v. Smith*, *supra*, 615 F.2d at p. 972.) Gutierrez has not shown, either below or on appeal, that Burum's proffered testimony would be clearly exculpatory. He did not make an offer of proof below in support of his alternative motion for a grant of use immunity to Burum. (Cf. *People v. Cudjo*, *supra*, 6 Cal.4th at p. 619 [defense did not make an offer of proof in trial court regarding defense witness's testimony].) Rather, both in the trial court and on appeal he merely speculates that Burum *could* have provided some testimony helpful to his defense. That is insufficient to satisfy the first element.

Likewise, Gutierrez does not show Burum's testimony was essential to his defense. Absent an offer of proof regarding Burum's anticipated testimony, we cannot conclude his testimony would be essential to Gutierrez's defense. It is unclear based on the record in this case that Burum's testimony would have been favorable to Gutierrez. (Cf. *In re Williams* (1994) 7 Cal.4th 572, 610 ["it is unclear whether his witnesses' testimony would have been favorable to petitioner"].) Rather, it is possible that had Burum testified, his testimony could have been damaging to Gutierrez's defense.

Finally, Gutierrez has not shown there is no strong governmental interest that countervails against a grant of immunity. (*Hunter, supra,* 49 Cal.3d at p. 974.) Had immunity been conferred on Burum, at any later prosecution of Burum related to this

matter the prosecution may have been forced to prove the evidence offered against him was not obtained or derived from his immunized testimony at Gutierrez's trial. (Cf. *People v. Stewart* (2004) 33 Cal.4th 425, 469.) That burden could support a finding the prosecution had a strong governmental countervailing interest in not granting Burum use immunity. (*Id*. at p. 470.) Accordingly, Gutierrez has not shown he was entitled to use immunity for Burum under the first *Hunter* test. (*Hunter*, at p. 974.)

Likewise, we conclude Gutierrez has not shown he was entitled to use immunity for Burum under the second *Hunter* test. (*Hunter*, *supra*, 49 Cal.3d at p. 975.) That test requires a showing the "prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence," thereby distorting the judicial factfinding process. (*Ibid*.) In the circumstances of this case, we cannot conclude the prosecution was refusing to grant immunity to Burum to suppress his essential exculpatory testimony. On the contrary, as discussed above, there is no showing, by offer of proof or otherwise, that Burum's testimony would have been exculpatory. In fact, the prosecution subpoenaed Burum as a percipient witness who could provide relevant testimony on the question of Gutierrez's guilt of the charges against him. The prosecution could reasonably expect that if Burum testified under oath at Gutierrez's trial, his testimony may not have been exculpatory but, in fact, could support its theory regarding Gutierrez's guilt. To the extent Gutierrez argues otherwise, he merely speculates regarding Burum's possible testimony and the prosecution's intent in not granting Burum use immunity. He does not persuade us the prosecution's refusal to grant use immunity to Burum distorted the judicial factfinding

process. (*Ibid*.) We conclude Gutierrez has not shown the second *Hunter* test applied to require a grant of use immunity to Burum. (*Ibid*.; cf. *People v. Stewart*, *supra*, 33 Cal.4th at pp. 470-471.) Because Gutierrez has not shown that if the trial court had authority to grant Burum use immunity he would have been constitutionally entitled to it under either of the two *Hunter* tests, we conclude the trial court did not violate Gutierrez's constitutional rights or otherwise err by not granting use immunity to Burum.

III

Statements of Alleged Coconspirator Postmus

Gutierrez contends the trial court erred by admitting statements made by Postmus, an alleged coconspirator, pursuant to Evidence Code section 1223.

A

Before the first trial, the prosecution filed a motion to admit certain statements made by Postmus, an alleged coconspirator, pursuant to Evidence Code section 1223. Although no conspiracy count was alleged against Gutierrez at that time, the prosecution argued the evidence supported an uncharged conspiracy among Burum, Postmus, and Gutierrez to give Gutierrez a sham job. It argued certain statements made by Postmus to Aleman, Lehrer, and Cameron were made in furtherance of that conspiracy. Gutierrez opposed the motion, arguing there was no evidence there was a conspiracy between Postmus and him or of any crime committed by either of them.

Before the first trial began, the trial court initially denied, without prejudice, the prosecution's motion to admit Postmus's statements pursuant to Evidence Code section 1223, noting the prosecution could raise it again as evidence was presented at trial.

Apparently during the first trial, the trial court granted the prosecution's motion and admitted statements made by Postmus pursuant to Evidence Code section 1223.[6]

During the second trial, the trial court incorporated its ruling made in the first trial and, over Gutierrez's objection, again admitted statements made by Postmus pursuant to Evidence Code section 1223.

B

"Hearsay evidence is of course generally inadmissible. (Evid. Code, § 1200.) Hearsay statements by coconspirators, however, may nevertheless be admitted against a party if, at the threshold, the offering party presents 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.' [Citations.] Once independent proof of a conspiracy has been shown, three preliminary facts must be established: '(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.' " (*People v. Hardy* (1992) 2 Cal.4th 86, 139.)

Evidence Code section 1223 provides:

> "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

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6 Although the appellate record does not contain that ruling, the People represent, and Gutierrez does not dispute, the trial court made that ruling during the first trial. Accordingly, for purposes of this appeal, we assume the trial court admitted Postmus's statements during the first trial pursuant to Evidence Code section 1223.

> "(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
>
> "(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
>
> "(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

"The existence of a conspiracy at the time the statement is made is the preliminary fact to the admissibility of the coconspirator's statement. . . . [T]he proponent must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more likely than not to have existed." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) "[T]he prima facie showing of fact of a conspiracy is in fact evidence sufficient to sustain a finding of fact of a conspiracy by a preponderance of the evidence." (*Id*. at p. 62.) "The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

C

We conclude the trial court did not err by admitting Postmus's statements pursuant to Evidence Code section 1223. First, there was substantial independent evidence to establish a prima facie case that a conspiracy existed at the time of Postmus's statements to Aleman, Lehrer, and Cameron. Excluding the statements in question, there was ample evidence for a trier of fact to conclude, by a preponderance of the evidence, a conspiracy

existed among Burum, Postmus, Gutierrez and, possibly, Aleman to commit the crime of grand theft by giving Gutierrez a sham job.

Without restating all of the evidence summarized above, we note evidence showed planning for the sham job began when Postmus and Aleman worked to have County create 13 new positions at the Assessor's Office to be used for political purposes when Postmus became the Assessor. Hunter was the first person to hold the position of intergovernmental relations officer at the Assessor's Office, a position that had no real duties. After Gutierrez, a City councilmember, learned his teaching contract would not be renewed, he told Burum, a developer with projects before City's council, that he needed a job. Burum told him Postmus owed him a favor and asked him how much he wanted to make. Gutierrez met with Postmus and Aleman to interview for the position of the Assessor's Office intergovernmental relations officer. Gutierrez was the only person interviewed for the job. The interview was not a typical interview and was more of a political and social conversation. Burum and his projects in City were discussed. At the end of the interview, Postmus told Gutierrez that Aleman would find something for him to do and that he would start at the top salary step. Before the interview, Postmus told Aleman he wanted to hire Gutierrez because doing so was near and dear to Burum's heart and that it would be politically advantageous to do so. After the interview, Postmus called Burum and told him he had just hired Gutierrez at the top step. Postmus told Aleman he hired Gutierrez as a favor to Burum. Postmus said that if he took care of Gutierrez and Gutierrez took care of Burum, then Burum would take care of him (Postmus).

Gutierrez, Postmus, and Aleman understood the purpose of Gutierrez's position with the Assessor's Office was to keep him available to Burum in City. Gutierrez stated that Burum takes care of him, so he needs to take care of Burum. He bragged to others that he worked for "Daddy Jeff" (i.e., Burum). Gutierrez stated he wanted to make sure Burum was part of a 1,200-acre project in City. Gutierrez told Lehrer that he was close to Burum, who helped him get his job. Gutierrez told Lehrer he wanted to take care of the 1,200-acre project for Burum. He also told Lehrer Davidson told him that if he (Gutierrez) "play[ed] ball," Burum would see that he was taken care of.

Because Gutierrez's position was a sham job and had no actual duties, he was assigned work to create the appearance he was actually doing something. After he was hired, Gutierrez performed little, if any, work for the Assessor's Office. Instead, he spent substantial time working on City business and attending City events outside the office. He often left the office early or did not show up at all. However, he regularly submitted time sheets showing he worked 40 hours per week, even though he took five sick days while attending City events and claimed to have worked 156 hours for County while he was attending City events.

After County's Board of Supervisors eliminated the position of intergovernmental relations officer, Gutierrez asked Burum for assistance, stating: "Jeff, I need you to prevail upon Bill [Postmus] to extend my position for up to three weeks. . . . Can you give Bill a call?" Gutierrez remained employed by the Assessor for weeks thereafter even though there was no money budgeted for his position.

Based on the above evidence, we conclude the trial court correctly found there was sufficient independent evidence to make a prima facie case that a conspiracy existed among Burum, Postmus, Gutierrez and, possibly, Aleman to commit the crime of grand theft by giving Gutierrez a sham County job for which he was paid a salary. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139; Evid. Code, § 1223.)

Given that showing of independent evidence of a conspiracy, we further conclude that, as to each of the challenged statements made by Postmus, the three preliminary facts set forth in Evidence Code section 1223 were also shown. Gutierrez apparently challenges certain statements made by Postmus to Aleman, Lehrer, and Cameron. When Aleman complained to Postmus about Gutierrez's job performance, Postmus told him his (Postmus's) hands were tied because he could not upset Burum. Postmus also told Aleman he could not discipline Gutierrez because he "carries the water" for Burum in City.

Postmus told Lehrer he was concerned about others' complaints about Gutierrez's absences and lack of work and that Gutierrez "doesn't give a fuck about me or my office." Postmus told Lehrer he did not want to discipline Gutierrez because Burum would be upset. When Cameron told Postmus about Gutierrez's absences and inaccurate time reporting, Postmus told him he knew, implied he was not in total control, and that there was some other influence over his decisions regarding Gutierrez.[7]

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[7] To the extent Gutierrez challenges the admission of other statements made by Postmus, he does not carry his burden on appeal to show that, as to each such statement, the requirements for admission under Evidence Code section 1223 were not satisfied.

Based on the evidence discussed above, there was substantial evidence to support a finding that, at the time each of those statements were made by Postmus, both Postmus and Gutierrez were participating in the conspiracy. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139; Evid. Code, § 1223.) Contrary to Gutierrez's assertion, it could be reasonably inferred from the above evidence that he was participating in the conspiracy and was not merely an innocent beneficiary of a conspiracy involving only Burum, Postmus, and Aleman. Therefore, the first and third preliminary facts under Evidence Code section 1223 were shown. Furthermore, we conclude there was substantial evidence to support a reasonable inference that each of those statements was made by Postmus in furtherance of the objective of the conspiracy. (*Hardy*, at p. 139; Evid. Code, § 1223.) The trial court could reasonably infer those statements were made by Postmus as an "attempt to avoid detection and thus protect the aims of the conspiracy." (*In re Hardy* (2007) 41 Cal.4th 977, 999.) It could be inferred that, in response to those complaints by Aleman, Lehrer, and Cameron, Postmus attempted to explain to them why he could not, or was reluctant to, discipline Gutierrez and thereby mollify them so they would not disrupt or expose the conspiracy. The second preliminary fact under Evidence Code section 1223 was shown. The trial court properly admitted Postmus's statements pursuant to Evidence Code section 1223.

IV

Section 654

Gutierrez contends section 654 precluded punishment for both counts of grand theft by false pretenses (counts 2 and 3) and therefore execution of his sentence for count 3 must be stayed.

A

The amended information charged Gutierrez with grand theft by false pretenses (§§ 487, subd. (a), 532) for the period of March 19, 2007, through March 18, 2008 (count 2) and grand theft by false pretenses (§§ 487, subd. (a), 532) for the period of March 19, 2008, through January 2, 2009 (count 3). The jury found him guilty on all counts, including both grand theft counts. The trial court imposed a two-year term for count 2, a consecutive eight-month term for count 3, and stayed execution of terms imposed for counts 1 and 4 pursuant to section 654, for an aggregate term of two years eight months in prison.

B

Section 654, subdivision (a), prohibits multiple punishment for the same act, stating:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the largest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

Section 654 prohibits only multiple punishment, not multiple convictions, for the same act. (*People v. Britt* (2004) 32 Cal.4th 944, 951.)

The California Supreme Court has stated: "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' (*Neal v. State of California* [(1960) 55 Cal.2d 11, 19].) A decade ago, we criticized this test but also reaffirmed it as the established law of this state. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1209-1216 [23 Cal.Rptr.2d 144, 858 P.2d 611].) We noted, however, that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted. [Citation.] . . . [¶] Section 654 turns on the *defendant's* objective in violating both provisions . . . ."[8] (*People v. Britt*, *supra*, 32 Cal.4th at pp. 951-952.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to

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8 We note that on June 21, 2012, the California Supreme Court issued its opinion in *People v. Correa* (2012) 54 Cal.4th 331. Based on our review of *Correa*, we conclude its holding does not apply to Gutierrez's arguments in this case. Accordingly, we do not discuss its circumstances or holding. Nevertheless, we note *Correa* concluded "section 654 does not bar multiple punishment for violations of the same provision of law." (*Id.* at p. 344.)

the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) "[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

C

There is substantial evidence to support the trial court's finding that his two grand theft offenses did not involve a single intent and objective within the meaning of section 654 and therefore section 654 did not apply to bar punishment for both offenses. The record shows Gutierrez periodically (i.e., every two weeks) submitted time sheets reporting the time he worked for County during that period. Based on the false representations he made on those time sheets, County paid him his salary for that period. He was convicted on count 2 of grand theft by false pretenses for the period of March 19, 2007, through March 18, 2008, and on count 3 of grand theft by false pretenses for the period of March 19, 2008, through January 2, 2009. There is substantial evidence to support a reasonable inference by the trial court that each time Gutierrez falsely reported his time worked on a time sheet he acted with the separate intent and objective of

obtaining from County his paycheck for that period based on the falsely reported work. Furthermore, because he completed a time sheet for each two-week pay period during the two relevant time periods in counts 2 and 3, the trial court could find that each time he completed a time sheet, he had ample time to reflect and renew his intent to falsely represent his time worked yet again to obtain his County paycheck based on that false representation. (*People v. Andra* (2007) 156 Cal.App.4th 638, 642 [defendant had substantial opportunity to reflect on her conduct and then renew her intent to commit yet another crime].)

Even though Gutierrez, as he argues, had a single generalized intent or plan to obtain a County salary for his sham job, section 654 does not preclude multiple punishment for counts 2 and 3. Courts must avoid viewing a defendant's intent or objective too broadly or amorphously. (*People v. Perez* (1979) 23 Cal.3d 545, 552; *People v. Morelos* (2008) 168 Cal.App.4th 758, 769.) "Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' (*People. v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11 . . . ; see, e.g., *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1254 . . . .) This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one . . . ." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) "If the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in

pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Beamon*, at p. 639.)

Furthermore, each time County issued Gutierrez a paycheck in reliance on the false representations on his time sheet, County suffered a distinct harm. (*People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800-1801.) Finally, neither count 2 nor count 3 was the means of committing the other offense. They were separate grand theft offenses separated by time and by intent. Gutierrez's count 2 grand theft was not the means for Gutierrez to commit his count 3 grand theft. (Cf. *People v. Neder* (1971) 16 Cal.App.3d 846, 854 [section 654 did not bar punishment for each of three forgeries directed at obtaining different property from same store and were not a means for committing another forgery].)

There is substantial evidence to support the trial court's finding that counts 2 and 3 did not involve an indivisible or continuing course of conduct with a single intent and objective. None of the cases cited by Gutierrez are factually apposite or persuade us to conclude otherwise. We conclude the court did not err by executing sentence on Gutierrez for both counts 2 and 3.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.